

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1213

To be argued by
PAMELA ROGERS CHEPIGA

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1213

UNITED STATES OF AMERICA,

Appellee,

—v.—

LUIS CASHMERE,

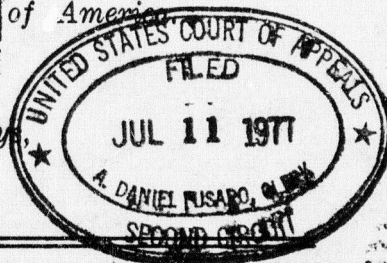
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America*

PAMELA ROGERS CHEPIGA,
ROBERT J. JOSSEN,
*Assistant United States Attorneys,
Of Counsel.*



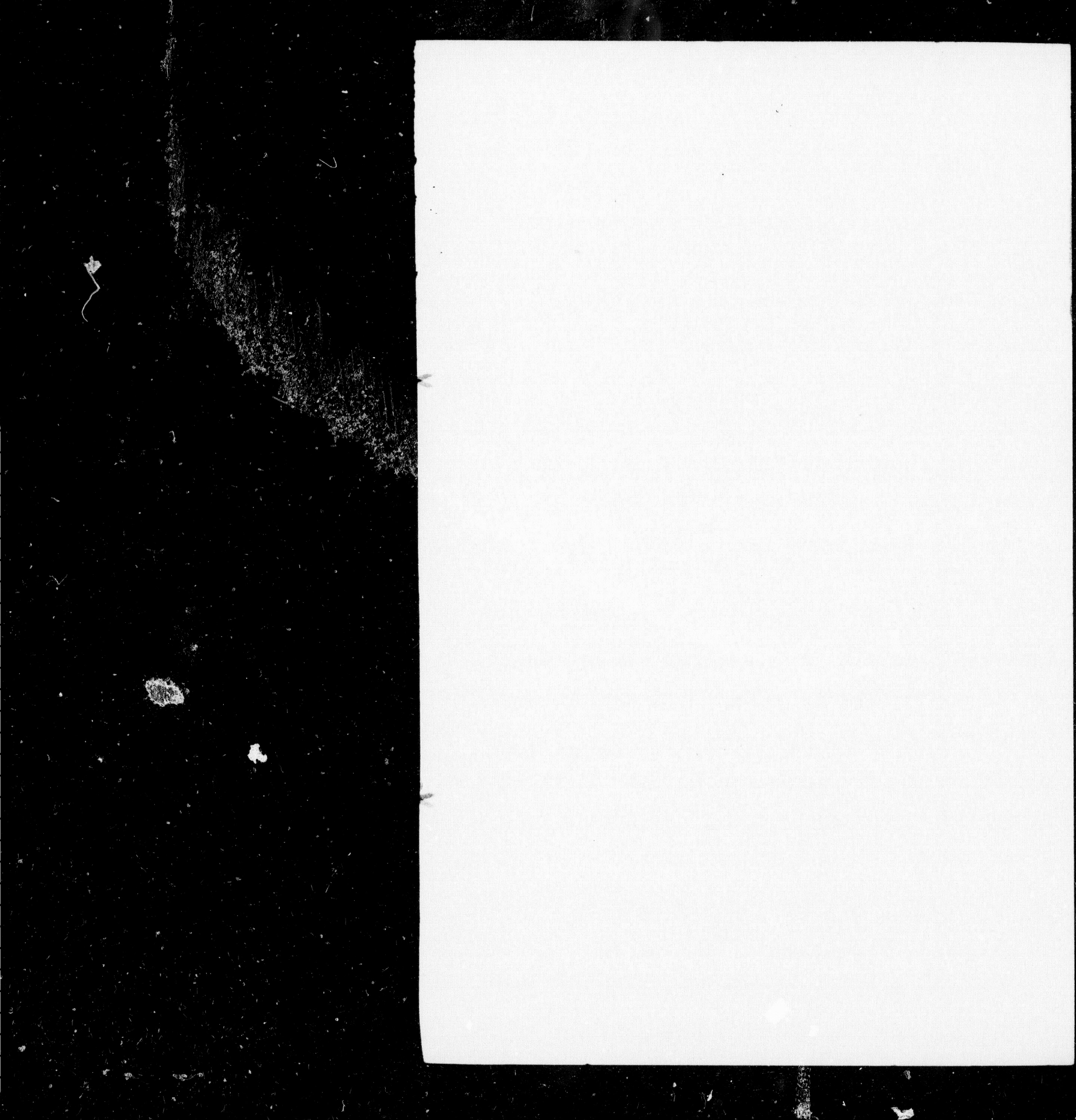


TABLE OF CONTENTS

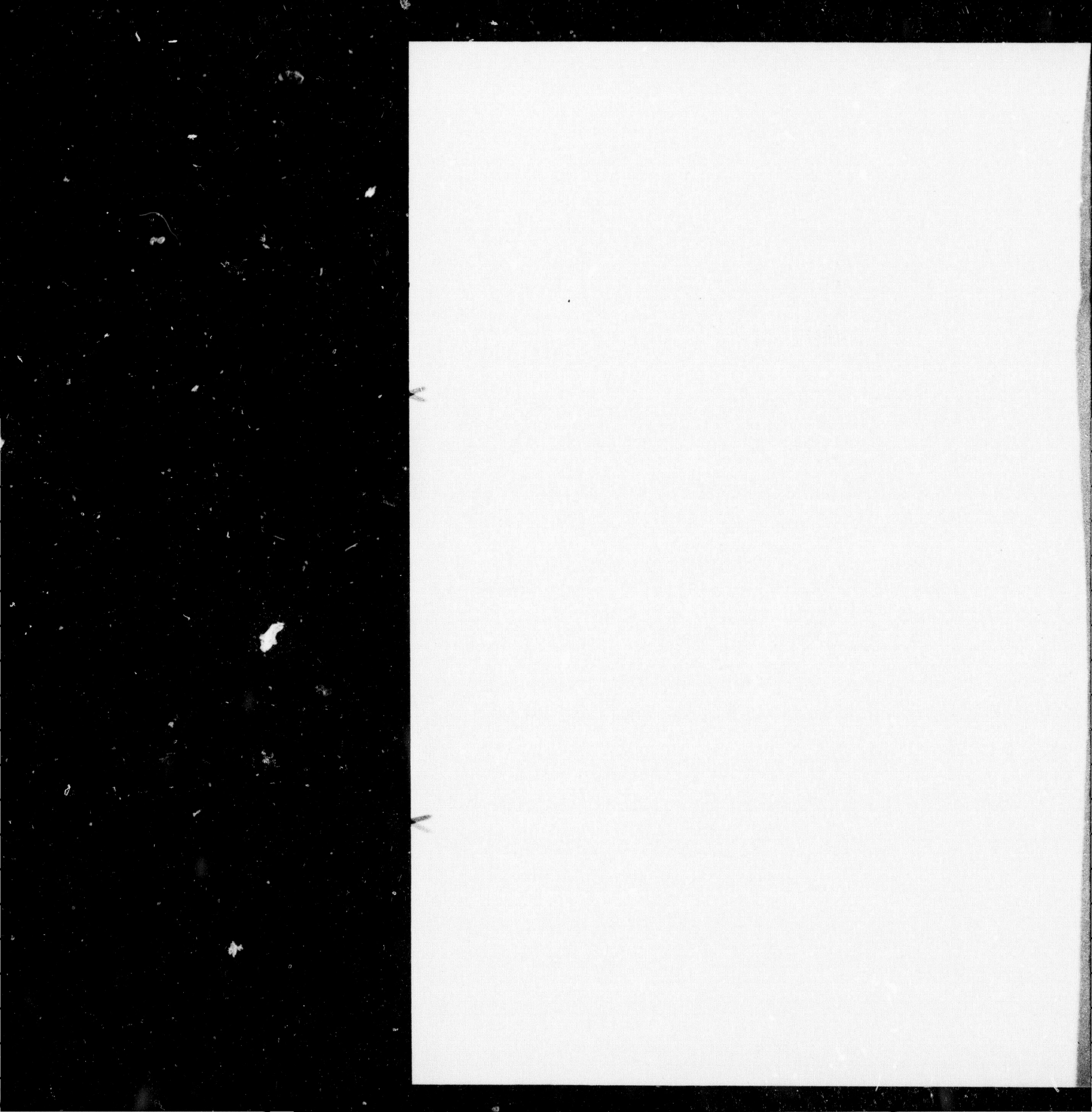
	PAGE
Preliminary Statement	1
Statement of Facts	2
The Government's Case	2
A. Summary	2
B. The Proof at Trial	2
The Defense Case	6
ARGUMENT:	
The Evidence of Cashmere's Possession of the Brown Paper Bag Containing Cocaine Was More Than Sufficient	7
CONCLUSION	12

TABLE OF CASES

<i>Arellanes v. United States</i> , 302 F.2d 603 (9th Cir.), <i>cert. denied</i> , 371 U.S. 930 (1962)	9
<i>Bettis v. United States</i> , 408 F.2d 563 (9th Cir. 1969)	9
<i>DiCarlo v. United States</i> , 6 F.2d 364 (2d Cir.), <i>cert.</i> <i>denied</i> , 268 U.S. 706 (1925)	11
<i>Evans v. United States</i> , 257 F.2d 121 (9th Cir.), <i>cert. denied</i> , 358 U.S. 866 (1958)	8
<i>Glasser v. United States</i> , 315 U.S. 60 (1942)	7
<i>Guevara v. United States</i> , 242 F.2d 745 (5th Cir. 1957)	9
<i>Holland v. United States</i> , 348 U.S. 121 (1954)	11

	PAGE
<i>United States v. Almendarez</i> , 534 F.2d 648 (5th Cir. 1976)	9
<i>United States v. Blake</i> , 484 F.2d 50 (8th Cir. 1973), cert. denied, 417 U.S. 949 (1974)	8
<i>United States v. Castro</i> , 531 F.2d 739 (5th Cir. 1976)	10
<i>United States v. Contreras</i> , 446 F.2d 940 (2d Cir. 1971)	8
<i>United States v. Graham</i> , 102 F.2d 436 (2d Cir.), cert. denied, 307 U.S. 643 (1939)	11
<i>United States v. Grant</i> , 545 F.2d 1309 (2d Cir. 1976), cert. denied, 97 S. Ct. 1130 (1977)	8
<i>United States v. Heiden</i> , 508 F.2d 898 (9th Cir. 1974)	9
<i>United States v. Jackson</i> , 423 F.2d 506 (9th Cir.), cert. denied, 400 U.S. 823 (1970)	10
<i>United States v. Johnson</i> , 513 F.2d 819 (2d Cir. 1975)	9
<i>United States v. Jones</i> , 308 F.2d 26 (2d Cir. 1962) (en banc)	8
<i>United States v. Kearse</i> , 444 F.2d 62 (2d Cir. 1971)	9
<i>United States v. Koss</i> , 506 F.2d 1103 (2d Cir. 1974), cert. denied, 420 U.S. 977 and 421 U.S. 911 (1975)	7
<i>United States v. Lacouture</i> , 495 F.2d 1237 (5th Cir.), cert. denied, 419 U.S. 1053 (1974)	9
<i>United States v. Lubrano</i> , 529 F.2d 633 (2d Cir. 1975), cert. denied, 429 U.S. 818 (1976)	11
<i>United States v. Mather</i> , 465 F.2d 1035 (5th Cir.), cert. denied, 409 U.S. 1085 (1972)	8

	PAGE
<i>United States v. Singleton</i> , 532 F.2d 199 (2d Cir. 1976)	10
<i>United States v. White</i> , 463 F.2d 18 (9th Cir.), cert. denied sub nom. <i>Alexander v. United States</i> , 409 U.S. 1024 (1972)	9



United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1213

UNITED STATES OF AMERICA,

Appellee,

—v.—

LUIS CASHMERE,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Luis Cashmere appeals from a judgment of conviction entered on December 13, 1976, in the United States District Court for the Southern District of New York, after a two day trial before the Honorable Edmund L. Palmieri, United States District Judge, and a jury.

Indictment 76 Cr. 472, filed on May 12, 1976, charged Luis Cashmere in one count with possession of a narcotic drug controlled substance with intent to distribute, in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).

Trial commenced* before Judge Palmieri and a jury on October 26, 1976, and concluded on October 27, 1976, when the jury returned a verdict of guilty.

On December 13, 1976, Judge Palmieri sentenced Cashmere to a term of imprisonment of eight years, to be followed by a five year period of special parole.

Cashmere is presently serving his sentence.

Statement of Facts

The Government's Case

A. Summary

In the early afternoon of February 5, 1976, based on statements provided by a reliable informant, Special Agents of the Drug Enforcement Administration ("DEA") stopped the defendant, Luis Cashmere, for questioning as he was seated in his car. As Cashmere opened the door to step outside he kicked a brown paper bag out of the car and onto the ground. Cashmere then kicked the bag again in an attempt to hide it under the car. One of the DEA agents picked up the bag, determined that it contained a large amount of cocaine and placed Cashmere under arrest.

B. The Proof At Trial

The Government presented the testimony of the three DEA agents who were present at the time of Cashmere's

* Prior to trial Cashmere moved to suppress the cocaine found at the time of his arrest. Following a hearing on September 15, 1976, Judge Whitman Knapp, to whom the case originally had been assigned, denied the motion.

arrest. Special Agent John Lawler testified that on February 5, 1976, between the hours of 9 A.M. and 1 P.M., he was on surveillance in the vicinity of Third Avenue and 116th Street in Manhattan. During this time period Lawler and other DEA agents maintained essentially continuous observation of a 1973 black Chrysler, bearing New York plates 608XMJ, which was parked on the eastside of Third Avenue between 115th and 116th Streets. (Tr. 21-23, 41, 79-80).*

At about 1 P.M., Lawler observed Cashmere walk south on Third Avenue from 116th Street and approach the driver's side of the black Chrysler. When the defendant was seen to enter the car, Lawler put this information out to other DEA agents over a two-way radio and then moved his own car alongside Cashmere's car.** (Tr. 24, 46, 48-49). Lawler got out of his car and came around to the front of the black Chrysler. He took out his shield, displayed it to Cashmere and announced that he was a federal agent. Lawler then placed the shield up against the car window, repeated that he was a federal agent and asked Cashmere to step outside. (Tr. 24, 55-56). Receiving no response, Lawler opened the door, reached in, removed the keys, and again asked Cashmere to step outside. As he moved to get out of the car, Cashmere kicked with his right leg a brown paper bag out of the car and onto the street. Outside the car, Cashmere then tried to kick the bag a second time, attempting to

* References to the trial transcript are cited as "Tr." References to the transcript of the suppression hearing held on September 15, 1976 are cited as "H. Tr."

** Although no direct evidence was introduced at trial to establish that Cashmere owned the car in which he was seated, Cashmere's attorney referred to the car as "Mr. Cashmere's car" and "his car." (Tr. 141-43). At the suppression hearing Agent Lawler testified that while he had the car under surveillance he had a check made of the license number and found that the car was registered to Luis Cashmere. (H. Tr. 27).

hide the bag under the car and away from the agent's view. However, this second time Cashmere "didn't get a really good kick at it" and only moved the brown bag slightly. Agent Lawler reached down, picked up the bag, examined its contents, and saw that it contained a familiar white powdery substance. Lawler then handed the bag to DEA Special Agent Richard Bell, who by this time was alongside of him, and placed Cashmere under arrest. (Tr. 25, 56-58, 60, 63-65).*

A scuffle ensued when Lawler attempted to place handcuffs on the defendant. Cashmere kept turning, moving his arms and yelling to the crowd which had started to gather. Special Agent Eugene Moran joined with Lawler to subdue Cashmere by placing him face down over the hood of a parked car and putting him in handcuffs.** The agents then had to struggle to get Cash-

* Bell had the black Chrysler under continuous surveillance from 9 A.M. that morning until Cashmere's arrest at approximately 1 P.M., except for two brief periods of five or ten minutes when he met with the informant. Bell testified that at no time did he see anyone place any object either into or under the black Chrysler. (Tr. 81, 87-88, 90). He observed Cashmere enter the Chrysler shortly before the surveillance ended at 1 P.M. In physical appearance Cashmere matched the description that Agent Bell had received at approximately 8 A.M. the same morning.

Upon observing Cashmere enter the car, Bell crossed over by foot from the west side of Third Avenue to assist in the arrest. He too observed Cashmere kick the brown paper bag containing the cocaine as he was getting out of the car, and Bell also saw Cashmere's subsequent attempt to kick the bag under the car. When Lawler handed the bag to Bell, he looked inside and observed a clear plastic bag containing white powder. (Tr. 82, 83-84, 94, 110-111, 113, 120-121).

** Special Agent Stephen Moran testified that sometime after 12:30 P.M. on February 5, 1976, he observed Cashmere leave a social club on 116th Street and walk toward Third Avenue. After a short while Moran drove his car to the point where Lawler and Bell were placing Cashmere under arrest. Moran did not see the brown paper bag but noted that Lawler was having difficulty in handcuffing the defendant and Moran moved in to assist. (Tr. 132, 138-139).

mere into the back seat of Lawler's car. When Cashmere refused to cooperate, the two agents had to drag him into the car, ripping Cashmere's clothes and bloodying his lip in the process. (Tr. 25-26, 66-69).*

Lawler proceeded to drive downtown to the DEA regional headquarters with Cashmere alone in the back seat. As he drove, Lawler observed Cashmere attempt to put down the back window by pressing an electric switch. He then pulled over and asked Moran, who had been following in his own car, to get in the back seat with the prisoner. (Tr. 26-27).

As he followed Lawler's car, Moran observed that Cashmere was thrashing about in the back seat. Moran parked his own car and got in the back seat with Cashmere. He noticed Cashmere lower the rear right window by pushing the electric switch with his manacled hands, and attempt to toss a brown paper bag outside. Moran took the bag and threw it onto the front seat out of Cashmere's reach. Unbeknown to Cashmere, the paper bag he attempted to throw out of the agent's car was not the one seized by the agents but was a different bag which contained Lawler's lunch. (Tr. 134-35, 147-50).**

* Bell confirmed that a scuffle ensued when Cashmere refused to be handcuffed. A young lady in the crowd asked where they were taking Cashmere. Bell showed her his shield and told her that Cashmere was being taken to the DEA offices and then to the United States District Court. (Tr. 85, 89, 125-126).

** It was stipulated at trial that a qualified DEA chemist would testify, if called as a witness, that the brown paper bag kicked out of the car by Cashmere at the time of his arrest and offered in evidence as Government Exhibit 1, contained 267.8 grams of cocaine hydrochloride, having a purity of 24.4%. (Tr. 157).

The Defense Case

The defendant did not testify, but called a single witness, Antonia Robles Perez. Perez testified that on the morning of February 5, 1976, she was with Cashmere at a bar on 116th Street. After a couple of drinks they left the bar and proceeded together to Cashmere's car. While Cashmere went to the driver's side to open the door of the car, Perez was on the sidewalk rummaging through her bag for a cigarette and had not entered the car. After a "fraction of a second" she looked up and saw someone hitting Cashmere on the lip. While several men tried to put handcuffs on Cashmere, he shouted a telephone number to her to call his wife. One of the men came over to her, said he was a policeman, and told her to get away, that she had nothing to do with this matter. (Tr. 158-61).

On cross-examination Ms. Perez stated that she had been with Cashmere earlier that morning at another social club where she worked as a barmaid. (Tr. 166-67). They arrived at the 116th Street club at about six or seven o'clock in the morning and stayed for a few hours until, at the latest, 11 o'clock. (Tr. 161-62). She had about six or eight drinks of sangria while with Cashmere. (Tr. 166). Perez denied seeing Cashmere in possession of cocaine or a brown paper bag. (Tr. 162).

ARGUMENT

The Evidence of Cashmere's Possession of the Brown Paper Bag Containing Cocaine Was More Than Sufficient.

The sole issue raised on this appeal by Cashmere is whether the proof adduced at trial was sufficient to establish that defendant "possessed" the brown paper bag which contained cocaine.* Viewed in the light, most favorable to the Government, as it must be on this appeal, *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Koss*, 506 F.2d 1103, 1106 (2d Cir. 1974), *cert. denied*, 420 U.S. 977 and 421 U.S. 911 (1975), the evidence establishing Cashmere's possession of the bag was clearly sufficient.

The evidence proffered by the Government at trial established that, at the time of his arrest, Cashmere was the sole occupant and had unfettered control of the black 1973 Chrysler automobile from which he attempted to dispose of the narcotics contraband. He was sitting in the driver's seat and the keys to the car were in the ignition. The car had been under nearly constant surveillance by agents of the DEA for approximately four hours prior to the time Cashmere entered the car. During the surveillance the agents did not see anyone other than Cashmere either enter or leave the car which was parked at 116th Street and Third Avenue. Cashmere at first refused to heed the agent's request to get out of

* As noted earlier, prior to trial Cashmere moved to suppress the paper bag and its illicit contents on the ground that the DEA agents did not have probable cause for the search and seizure. An evidentiary hearing was held and Judge Knapp, to whom the case was initially assigned, refused to suppress this evidence. The correctness of that ruling is not challenged on this appeal.

the car, subsequently exiting the automobile only with the assistance of the agents. In getting out of the car Cashmere used his right leg to kick the brown paper bag from the floor of the car on the driver's side onto the street. Cashmere then kicked the bag a second time in a clear attempt to hide the bag from view under the car. An agent then picked up the bag, looked into it, and found that it contained a large quantity of cocaine.*

In light of this proof the question of possession presented to the jury was neither abstract nor difficult. The jury was instructed, without objection, that in considering whether Cashmere possessed the brown paper bag "the word 'possess' has its common everyday meaning, that is to have something within your control." (Tr. 213). Moreover, this Court has ruled that in applying a criminal narcotics statute the word "possession" should not be "construed with undue narrowness". *United States v. Jones*, 308 F.2d 26, 30 (2d Cir. 1962) (*en banc*). Here, Cashmere's exclusive control over the automobile in which the bag was first spotted, together with his quick and repeated efforts to remove the cocaine from view upon the agent's inquiry, were more than ample proof of the "necessary dominion and control" to establish possession. *United States v. Grant*, 545 F.2d 1309, 1313 (2d Cir. 1976), *cert. denied*, 97 S. Ct. 1130 (1977).

First, exclusive control and dominion over a vehicle in which narcotics are located, alone "is a potent circumstance tending to prove knowledge of the presence of [the] narcotics, and control thereof." *Evans v. United*

* Although the issue has not been raised on appeal, the quantity of cocaine found in the paper bag (267.8 grams) was sufficient to establish an intent to distribute. See *United States v. Blake*, 484 F.2d 50, 57 (8th Cir. 1973), *cert. denied*, 417 U.S. 949 (1974); *United States v. Mather*, 465 F.2d 1035, 1037 (5th Cir.), *cert. denied*, 409 U.S. 1085 (1972); *United States v. Contreras*, 446 F.2d 940 (2d Cir. 1971).

States, 257 F.2d 121, 128 (9th Cir.), *cert. denied*, 358 U.S. 866 (1958). See *Arellanes v. United States*, 302 F.2d 603 (9th Cir.), *cert. denied*, 371 U.S. 930 (1962). Cashmere was not a "mere passenger" in the automobile, nor was there any other occupant in the car. Indeed, at the time of the agents' approach, Cashmere had a set of keys in his possession and was about to drive away when he was stopped for questioning. Thus, the presence of the contraband in the car which was under Cashmere's exclusive custody and control makes his situation markedly different from one in which a defendant is but a passenger, or one of several occupants in a car where contraband is located. In the latter instance, the immediate access of several individuals to the contraband diminishes the strength of the inference that any one particular person was responsible for placement or control of the illegal goods. See, e.g., *United States v. Johnson*, 513 F.2d 819 (2d Cir. 1975); *United States v. Heiden*, 508 F.2d 898, 901 (9th Cir. 1974); *Bettis v. United States*, 408 F.2d 563 (9th Cir. 1969). See also, *United States v. Almendarez*, 534 F.2d 648 (5th Cir. 1976); *United States v. Lacouture*, 495 F.2d 1237 (5th Cir.), *cert. denied*, 419 U.S. 1052 (1974); *United States v. White*, 463 F.2d 18, 21 (9th Cir.), *cert. denied sub nom. Alexander v. United States*, 409 U.S. 1024 (1972).*

* The cases relied upon by defendant fall within this obvious distinction. Thus, for example, in *United States v. Johnson, supra*, this Court held that the evidence was insufficient where defendant was a mere passenger in a car driven by his co-defendant and where there was no proof that he knew narcotics were secreted for illegal importation in the panel of a door of the car. Similarly, in *Guevara v. United States*, 242 F.2d 745 (5th Cir. 1957), the Court found the evidence insufficient where 50 marijuana cigarettes were found under the front seat of the car, in a position equidistant between defendant and his passenger. In *United States v. Kearse*, 444 F.2d 62 (2d Cir. 1971), the defendant was found in an apartment for which he had no lease, right of access to, or control over, but to which he had been invited

[Footnote continued on following page]

Second, Cashmere's actions after the initial investigatory stop by the drug enforcement officers demonstrated both directly and circumstantially actual possession of the cocaine. On three occasions—prior to his removal from the car, immediately after he was forcibly removed from the automobile and while in the agent's car after arrest—the defendant attempted to dispose of the brown paper bag and thereby control the direction and location of its contents.* Such physical attempts to dispose of contraband constitute proof of possession of the highest order. See, e.g., *United States v. Singleton*, 532 F.2d 199 (2d Cir. 1976); *United States v. Castro*, 531 F.2d 739 (5th Cir. 1976); *United States v. Jackson*, 423 F.2d 506 (9th Cir.), cert. denied, 400 U.S. 823 (1970).

United States v. Singleton, supra, provides a useful benchmark against which to measure Cashmere's claim that the evidence of his possession was insufficient. Singleton was the driver and sole occupant of a car when postal inspectors observed him throw a jacket out of the car's window while attempting to avoid the agents' questioning. The jacket pocket was found to contain checks which had recently been stolen from the mail. Although the evidence in *Singleton* established that the jacket did

as a guest. This Court held that, in such circumstances, the fact of defendant's reaction to the unexpected visit of law enforcement agents did not warrant his conviction for possession of the stolen goods found in the apartment. Moreover, none of the cited cases involved both exclusive control over the immediate premises where the contraband was located and the actions shown here to have been taken by Cashmere to hide the narcotics from discovery.

* Cashmere argues in this Court, as he did to the jury which rejected his contention, that these incidents were no more than evidence of his reaction to the agent's conduct. This claim however, is remarkably far-fetched given his three separate attempts to throw away the incriminating evidence, and in any event was one properly left for the jury to evaluate.

not belong to Singleton but to another individual who had been a passenger in the car, this Court found that there was ample evidence to prove that Singleton "possessed" the stolen checks.*

In the instant case, Cashmere's efforts to do away with the cocaine were indistinguishable from Singleton's single action in throwing the jacket out the car window. In both situations, the efforts to dispose of the contraband manifested not only custody and control of the goods—and therefore possession—but also constituted compelling proof of consciousness of guilt. *United States v. Graham*, 102 F.2d 436, 442 (2d Cir.), *cert. denied*, 307 U.S. 643 (1939); *DiCarlo v. United States*, 6 F.2d 364, 368 (2d Cir.), *cert. denied*, 268 U.S. 706 (1925). See 2 J. Wigmore, *Evidence*, § 278 (3d ed. 1940).

Finally, defendant contends that the Government failed to show that the brown paper bag was not placed in the car by someone other than Cashmere, specifically, that it was not placed there by Antonia Perez. This argument is completely without merit. The Government "is under no duty to negate all possible innocent inferences" where, based on the facts presented, "the jury could easily have properly inferred guilty possession from [the] same facts". *United States v. Singleton*, *supra*, 532 F.2d at 203. See *Holland v. United States*, 348 U.S. 121, 139-40 (1954). Indeed, in *United States v. Lubrano*, 529 F.2d 633, 636 (2d Cir. 1975), *cert. denied*, 429 U.S. 818 (1976), this Court pointed out that circumstantial evidence to be sufficient to support a guilty verdict "need not exclude all possible inferences but those of guilt." In view of Cashmere's situation and actions, the evidence here of his possession of the cocaine was powerful and plainly sufficient to warrant the jury's guilty verdict.

* The convictions in *Singleton* were reversed by this Court in view of a serious error in the trial court's charge.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

PAMELA ROGERS CHEPIGA,
ROBERT J. JOSSEN,
*Assistant United States Attorneys,
Of Counsel.*

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

A. O'Leary being duly sworn deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the *11* day of *July* 1977 he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

*Phyllis Sklar Beninger
Federal Defender Socs
26 Lafayette St.
New York, N.Y.*

And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at the United States Courthouse Annex, 1 St. Andrew's Plaza, Borough of Manhattan, City of New York.

Anne

Sworn to before me this

11 day of *July* 1977

Maria A. Israelian

MARIA A. ISRAELIAN
Notary Public, State of New York
No. 31-4521851
Qualified in New York County
Term Expires March 30, 1978